U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 24 March 2004

CASE NO. 2004-SOX-1

In the Matter of:

MARTIN DOLAN
Complainant

v.

EMC CORPORATION
Respondent

Appearances: Thomas C. Crooks, Esq.
For the Complainant

Pamela A. Smith, Esq.
For the Respondent

Before: DANIEL L. LELAND
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This cases arises out of a complaint of discrimination filed pursuant to the employee protection provisions of Public Law 107-204, Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, title VIII of the Sarbanes-Oxley Act of 2002, 18 USC § 1514A (Sarbanes-Oxley or the Act) enacted on July 30, 2002. 18 USC § 1514A(b)(2)(B) provides that an action under Section 806 of Sarbanes-Oxley will be governed by 49 USC § 42121(b). Sarbanes-Oxley affords protection from employment discrimination to employees of companies with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 USC § 781) and companies required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 USC § 780[d]). The law protects "whistleblower" employees from retaliatory or discriminatory actions by the employer, because the employee provided information to their employer, a Federal agency, or Congress relating to alleged violations of 18 USC §§ 1341, 1343, 1344, or 1348, or any provision of Federal Law related to fraud against shareholders.

Procedural History

Martin Dolan (complainant) filed a complaint under the Act on April 22, 2003. The complaint was investigated by the Occupational Safety and Health Administration and found to be untimely. Complainant requested a hearing before an administrative law judge, and a Notice

of Hearing was issued by the undersigned scheduling a hearing on December 16, 2003 in Chicago, IL solely on the issue of the timeliness of the complaint. On December 8, 2003 the parties filed a Joint Motion for Continuance of the hearing which was granted. Following a conference call with the undersigned, the parties submitted a Joint Stipulation of Facts with two attachments. On February 9, 2004, I issued an Order Setting Briefing Schedule setting a due date for briefs of March 10, 2004. The parties have filed timely briefs.

Issue

Was the complaint timely filed?

Findings of Fact

The facts will be briefly summarized. Complainant began working for EMC Corporation (Respondent) on January 4, 2000 as a Professional Services (PS) Senior Consultant in the Midwestern Region. See Appendix A, Joint, Stipulation (JS) at 1, attached hereto and incorporated herein. In January 2001, Respondent hired Manish Shah as Regional Professional Services Manager in Chicago. Complainant reported to Shah. (JS at 1) In July 2001, Complainant began reporting to Joanna Bradford who was chosen to head a newly formed PS group of nine EMC employees. (JS at 2) In August 2001, Bradford performed a stack ranking of the nine employees reporting to her and ranked Complainant sixth. Id.

In September 2001, Complainant reported to EMC's Human Resources Department that Shah was engaged is a series of billing schemes designed to inflate EMC's revenue. (JS at 2) In the same month, Complainant and eight other Midwest PS Region Consultants met with HR Representative Sean Dorfman to discuss Shah's alleged improper behavior. After an investigation, EMC terminated Shah's employment on February 1, 2002. Id.

In April 2002, Mark Stoecklein, Regional Professional Services Director, with input from Bradford, prepared Complainant's 2001 performance review with an overall rating of "Partially Meets Goals". (JS at 2) On April 8, 2002, Stoecklin placed Complainant on a Performance Improvement Plan (PIP) which Complainant refused to sign. (JS at 3) On November 22, 2002, Thomas Crooks, Complainant's counsel, wrote a letter to Paul Dacier, Respondent's counsel, requesting confirmation that the PIP had been removed from Complainant's file and is no longer in effect, and demanding that the "false and defamatory" performance appraisal also be removed from Complainant's file. (JS at 3, Appendix B, attached hereto and incorporated herein) He also requested clarification of Complainant's status after his return from military duty. Mr. Crooks urged Mr. Dacier to respond to the settlement proposal and either undo the retaliation against Complainant or settle matters so that Complainant can leave EMC. Mr. Crooks added that if neither path is taken, litigation will result. (Appendix B)

Patricia Hill, Respondent's counsel, responded to Mr. Crooks' letter on January 23, 2003. (JS at 3, Appendix C, attached hereto and incorporated herein) She clarified that the PIP was no longer in effect but denied that the performance appraisal was "false, malicious, or retaliatory" and refused to remove it from Complainant's file. Counsel further denied that EMC had

retaliated against Complainant. She agreed to comply with any statutory requirements following Complainant's return from military duty. (Appendix C)

Conclusions of Law

The Act provides that an individual who files a retaliation complaint must bring an action not later than 90 days after the date on which the violation occurs. See 18 USC § 1514A (b)(2)(D). See also the interim regulations at 29 CFR § 1980.103. The Act prohibits a company from discharging, demoting, suspending, threatening, harassing or in any other manner discriminating against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee engaged in protected activity. 29 CFR § 1980.102. Complainant argues that the January 23, 2003 letter from Respondent's counsel in which Respondent refused to correct Complainant's 2001 performance review was the last act of retaliation against Complainant, and as it was sent eighty nine days before the complaint was filed on April 22, 2003, the complaint is timely. He further maintains that all the prior alleged retaliatory acts committed by EMC are part of a continuing violation and are covered by the complaint. Complainant is clearly mistaken regarding the continuing violation theory. The Supreme Court has held in a case filed under Title VII of the Civil Rights Act of 1964 that each retaliatory adverse employment decision constitutes a separate act and that the plaintiff can only file a complaint to cover discrete acts that occurred within the applicable time period. The only exception to this rule is an action based on a hostile work environment which does not apply here. *See National Railroad Passenger Corporation v. Morgan*, 536 U.S. 101, 122 S Ct. 2061 (2002). The Court's holding in *Morgan* is equally applicable to complaints filed under Sarbanes-Oxley, and therefore, at most, Complainant's complaint would be timely only with respect to the January 23, 2003 letter of EMC's counsel.

Respondent advances two arguments to support its contention that the complaint is not timely. First, it argues that the January 23, 2003 letter is inadmissible evidence under Rule 408 of the Federal Rules of Evidence because it was made as part of settlement negotiations. The letter therefore cannot be used to resuscitate Complainant's time-barred complaint, it asserts. Respondent argues in the alternative that if the letter is admissible, an unfavorable performance evaluation does not constitute an adverse employment action, and that Complainant has not presented evidence of a causal nexus between Respondent's refusal to alter the negative performance evaluation and his protected activity.[1]

Rule 408 provides:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or the invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require

[1] Respondent's argument regarding the absence of a retaliatory nexus is premature as at this stage of the proceeding the only issue is the timeliness of the complaint.

> the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation.

Rule 408 was adopted for proceedings before the Office of Administrative Law Judges. See 29 CFR § 18.408.

The primary reason for excluding evidence of a compromise is to encourage nonlitigious solutions to disputes. The policy rationale behind Rule 408 arises from the fact that the law favors settlements, and if an offer of a dollar amount by way of compromise were taken as an admission of liability, voluntary efforts at settlement would be chilled. *See Reischenbach v. Smith*, 528 F. 2d 1072 (5th Cir. 1976), *Perzinski v. Chevron Chemical Co.*, 503 F. 2d 654 (7th Cir. 1974). However, settlement offers are only inadmissible if offered to prove liability or damages. Exclusion is not required when the evidence is offered for another purpose. *See Coakley & Williams Const. Inc. v. Structural Concrete Equipment, Inc.,* 973 F. 2d 349 (4th Cir. 1992), *Breuer Elec. Mfg. Co. v. Toronado Systems of America*, *Inc.*, 687 F 2d 182, 217 (7th Cir, 1982).

In the present case, Complainant is not seeking to introduce the January 23, 2003 letter of Respondent's counsel for the purpose of establishing liability, but as representing the final retaliatory act against Complainant. When introduced for this purpose, as opposed to attempting to prove Respondent's liability, the letter is not inadmissible pursuant to Rule 408. Moreover, I do not view the letter of January 23, 2003 as an offer of settlement or compromise. The letter merely stated that the PIP is no longer in effect, and that Complainant's performance evaluation will not be removed from his file, and set forth Respondent's position on the alleged retaliation and Complainant's status following his return from military service. The letter did not offer a compromise in return for Complainant dropping his complaint. *See Lightfoot v. Union Carbide Corp.*, 110 F. 3d 898 (2d Cir. 1987). Rule 408 does not preclude the admissibility of this evidence.

An adverse employment action must have some tangible job consequence. *Shelton v. Oak Ridge National Laboratories*, 1995-CAA-19 (ARB March 30, 2001). Unfavorable performance evaluations, absent tangible job consequences, do not constitute an adverse employment action. *Haywood v. Lucent Technologies, Inc*., 323 F. 3d 524 (7th Cir. 2003), *Igenfritz v. U. S. Coast Guard Academy*, 1999-WPC-3 (ARB August 28, 2001). In his 2001 performance evaluation, Complainant was given the rating of "Partially meets goals", the second lowest rating, for Project Planning, and Primary interface with customer and EMC personnel involved with engagement, and "Successfully meets goals", the third of five ratings, for Project Management. The narrative portion of the performance evaluation stated that Complainant has had difficulty meeting project commitments and meeting deadlines, that he needs to work on enhancing his ability to communicate effectively with his internal customers, that he needs to make an exerted effort to do more than minimally required and offer his assistance in team efforts, and that he has sent unprofessional e-mails to other employees. Although the performance evaluation is negative, Complainant has not indicated that it resulted in a lower

salary, directly jeopardized his job security, or caused any tangible job detriment. *Compare Boyton v. Pennsylvania Power & Light Co.* 94-ERA-32 (Sec'y October 20, 1995). The performance evaluation can not therefore be considered an adverse employment action. If the job performance evaluation is not an adverse employment action, then *a fortiori* Respondent's refusal to remove Complainant's performance evaluation from his file is not an adverse employment action.

Complainant has not shown that Respondent committed any violations of the Act that occurred within 90 days of the filing of the complaint. The complaint was therefore not timely filed and will be dismissed.

RECOMMENDED ORDER

IT IS ORDERED THAT the complaint filed by Complainant under the Sarbanes-Oxley Act is DISMISSED.

A

DANIEL L. LELAND
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: This decision shall become the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.110, unless a petition for review is timely filed with the Administrative Review Board ("Board"), U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210, and within 30 days of the filing of the petition, the ARB issues an order notifying the parties that the case has been accepted for review. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily shall be deemed to have been waived by the parties. To be effective, a petition must be filed within ten business days of the date of the decision of the administrative law judge. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the Board. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b), as found OSHA, Procedures for the Handling of Discrimination Complaints Under Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002; Interim Rule, 68 Fed. Reg. 31860 (May 29, 2003).